that those facts exist. Again, to quote Buckley L.J. in the case of *Hawkins* v. *Powells Tillary Steam Coal Co. Ltd.*[3] on Workmen's Compensation:

"When it is said that a person who comes to the Court for relief must prove his case, it is never meant that he must prove it with absolute certainty. No fact can be proved in this world with absolute certainty. All that can be done is to adduce such evidence as that the mind of the tribunal is satisfied that the fact is so. This may be done either by direct evidence or by inference from facts. But the matter must not be left to rest in surmise, conjecture, or guess."

In the present case there was no evidence to show that the respondent's earning capacity had decreased in any way as a result of the accident. On the contrary, there was evidence that when she resumed work after the accident, she was earning the same wages as before the accident. There was also evidence that she was paid the same wages because she was able to do the same work and that the wages were not paid to her out of any consideration of charity. She adduced no evidence to show that her earning capacity in every employment which she was able to undertake at the time of the accident had been reduced in any way. It seems to me, therefore, that she had not discharged the burden of proof which rested upon her, and that the learned President was not entitled to indulge in surmise, or speculation, or conjecture, or guess, which in fact, as it seems to me, he did. The learned President was also wrong in taking into consideration the normal practice for an estate to re-employ injured tappers, the absence of a guarantee that the workman might not lose his employment or the possible fragmentation of the estate when there was no evidence whatsoever on these points.

For the reasons which I have stated I have come to the conclusion that this appeal must be allowed and that the order of the learned President be set aside. There will be an order accordingly. In all the circumstances of the case and in view of what the learned counsel for the appellant has stated, there will be no order as to costs.

Appeal allowed.

Solicitors: *Shearn Delamore & Co.*

YOHANNAN v. REGINA

[A. Cr. J. (Chua J.) December 21, 1962]

[Singapore — Magistrate's Appeal No. 132 of 1962]

Criminal Procedure — Statement made by witness to police officer in the course of police investigation — Request by accused to refer to statement — Refusal by Magistrate to order production or refer to statement — Whether prejudicial to appellant — Criminal Procedure Code (Cap. 132), ss.120 and 121(2).

The court is obliged, under section 121(2) of the Criminal Procedure Code, on the request of the accused, to refer to the statement of the witness to the police and the court has a discretion, if it thinks it expedient in the interest of justice, to direct that the accused be furnished with a copy of it to enable the accused to impeach the credit of the witness in manner provided by the Evidence Ordinance.

In this case the appellant requested the Magistrate to refer to a statement made by the complainant to a police inspector under the provisions of section 121(2) of the Code. The prosecution objected to the production of the statement on the ground that it was inadmissible and the Magistrate upheld this objection.

Held: the Magistrate was wrong in refusing to order the production of the statement and referring to it. That omission had prejudiced the accused and it could not be said that he had a fair trial. There had been a failure of justice and the conviction could not be sustained.

MAGISTRATE'S CRIMINAL APPEAL.

T. T. Rajah for the appellant.

Sachi Saurajen (Deputy Public Prosecutor) for the respondent.

Chua J.: This is an appeal from a conviction under section 147 of the Penal Code, and a sentence of 4 months imprisonment.

The charge against the appellant was that he on or about the 3rd January, 1962, at about 4.45 p.m. at Dairy Farm Road, Singapore, was a member of an unlawful assembly and in prosecution of the common object of such assembly viz. to cause bodily harm to one Lee Tat Hin, committed an offence of rioting and thereby committed an offence punishable under section 147 of the Penal Code. At the close of the case for the prosecution, counsel for the appellant submitted that no case had been made out against the appellant which, if unrebutted, would warrant his conviction. The Magistrate, however, after hearing the prosecution in reply, called on the appellant to enter upon his defence. The appellant on the advice of his counsel elected to remain silent and thereupon the appellant was convicted and sentenced to 4 months imprisonment.

Briefly the prosecution's case was that on the 3rd January, 1962, at about 4.45 p.m., Lee Tat Hin, an accountant of Gammon (Malaya) Ltd., was leaving the premises of the Company in the Company's car, driven by one Mohamed, together with two colleagues Whitley and Atkinson. The car slowed down at a bend in the road and an Indian sprang at the car from behind roadside stall. The Indian held some stones in his hand and he made a threatening gesture to toss the stones at the occupants of the car. The car stopped. Then a group of Indians converged on the car. Lee Tat Hin said that he saw not less than 10 persons and that he could recognise the appellant whom he knew as "John" as being one of them. The appellant was shouting something to the men who had already surrounded the car. Then the appellant went up to the door of the car nearest to Lee Tat Hin and opened it. With the assistance of some Indians the appellant tried to drag out Lee Tat Hin; when the appellant failed to drag out Lee Tat Hin he punched Lee Tat Hin a few times and then urged the others to do so. The others

then commenced to assault Lee Tat Hin. An Indian then hurled a broken handle of a shovel at Lee Tat Hin through a window but Lee Tat Hin deflected it with his arm.

There were four eye-witnesses to the incident but the prosecution relied entirely on Lee Tat Hin's evidence as regards the actual incident itself. Although Mohamed, the driver, was subpoenaed by the prosecution and was in Court, the prosecution decided not to call him but offered him to the defence. Whitley and Atkinson were not called to give evidence. The reason given by the prosecution was that Atkinson had gone to England and Whitley was in the Federation and could not be contacted.

The following facts are not in dispute. Lee Tat Hin went to the Thomson Road Police Station where he made a report at 5.45 p.m. on the day of the incident. In that report he said:

"Assaulted by ex-Gammon (Singapore) Ltd. employees whilst leaving the Company's premises at about 4.45 p.m.

Received a cut lip, injured right hand and received sundry blows."

He remained at the police station for some time and eventually the police told him that he should make a report at the Bukit Panjang Police Station. A Police Constable then accompanied Lee Tat Hin to the Bukit Panjang Police Station and there Lee Tat Hin was seen by Inspector Sathivellu who took a statement from him and wrote it in the Station diary but it was not signed by Lee Tat Hin. The Inspector then told Lee Tat Hin that it was a non-seizable case and to take a summons under section 323 for voluntarily causing hurt. Nothing apparently happened until the 16th February, 1962, when Inspector Wan Kim Yam took statements from Lee Tat Hin, Atkinson and Whitley. The appellant was not charged with the present offence until the 7th May, 1962.

In the course of cross-examining Lee Tat Hin, counsel for the appellant requested the Magistrate to refer to the statement made by the witness to Inspector Sathivellu under the provisions of section 121(2) of the Criminal Procedure Code. The prosecution objected to the production of the statement on the ground that it was inadmissible and the Magistrate upheld this objection. In the course of the cross-examination of Inspector Sathivellu, appellant's counsel again asked for the production of the statement but it was not produced.

The main ground of appeal is that the appellant has been prejudiced by reason of the wrongful refusal of the Magistrate to order the production of the statement and to refer to it as requested by the appellant. The contention of appellant's counsel is that since the Inspector had classified the offence as one under section 323 then the statement made by Lee Tat Hin did not disclose a case of rioting. Counsel also pointed out that the report of Lee Tat Hin made at the Thomson Road Police Station did not disclose a case of rioting and the Magistrate should have referred to the statement as requested by the appellant.

Section 121(2) of the Criminal Procedure Code provides as follows:

"When any witness is called for the prosecution or for the defence, other than the accused, the court shall, on the request of the accused or the prosecutor, refer to any statement made by such witness to a police officer in the course of a police investigation under this Chapter and may then, if the court thinks it expedient in the interests of justice, direct the accused to be furnished with a copy thereof; and such statement may be used to impeach the credit of such witness in manner provided by the Evidence Ordinance."

The Deputy Public Prosecutor appearing on behalf of the Crown concedes that the statement made to Inspector Sathivellu was made in the course of police investigation but submits that section 121(2) does not apply as the statement was not read over to Lee Tat Hin, and was not signed by Lee Tat Hin as required by section 120(3) of the Criminal Procedure Code.

Section 120 of the Criminal Procedure Code reads as follows:

"120. (1) A police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

(2) Such person shall be bound to state truly the facts and circumstances with which he is acquainted concerning the case save only that he may decline to make with regard to any fact or circumstance a statement which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) A statement made by any person under the provisions of this section shall be read over to him and shall, after correction if necessary, be signed by him."

I am unable to agree with the submission of the Deputy Public Prosecutor. Section 121(2) nowhere says that the Court cannot refer to a statement made to the police by a witness which does not comply with the provisions of section 120(3). The object of section 121(2) is to protect the accused against untruthful witnesses and the police or the prosecution cannot render the section nugatory by disobeying the provisions of section 120(3).

The Magistrate in this case was wrong in refusing to order the production of the statement and referring to it.

The question is what is the legal effect? The law appears to me to be perfectly clear. There is a definite provision under which the Court is obliged, on the request of the accused, to refer to the statement of the witness to the police and the Court has a discretion, if it thinks it expedient in the interest of justice, to direct that the accused be furnished with a copy of it to enable the accused to impeach the credit of the witness in manner provided by the Evidence Ordinance. The right given to the accused by section 121(2) is a very valuable one and often provides important material for cross-examination of the prosecution witnesses.

There is no doubt in this case that the appellant had lost the chance of putting to the witness Lee Tat Hin his previous statement in case it happened to be contradictory. The omission by the Magistrate to refer to the statement of Lee Tat Hin had prejudiced the appellant and it cannot be said that the appellant had a fair trial. There has been a failure of justice in this case and the conviction cannot be sustained. The conviction of the appellant is quashed and the sentence set aside.

I do not order a retrial as it appears to me that in this case it would be inequitable to order a new trial.

Appeal allowed.

Re LIEW SWEE LAN

[O. C. J. (Suffian J.) May 15, 1962]

[K.L. — In Bankruptcy No. 129 of 1960]

Bankruptcy — Act of bankruptcy — Security bond, by surety — Agreement therein that decree be executed against surety in same way as against defendant — Judgment against defendant unsatisfied — Whether separate judgment necessary against surety to found bankruptcy petition — Bankruptcy Ordinance, 1959, s.3.

This was a bankruptcy petition against one L.S.L. who stood surety for the defendant in a civil suit in which the petitioners were plaintiffs. The form of the security bond stated that a decree obtained against the defendant may be executed against the surety in the same way as it might be executed against the defendant. Judgment having been obtained against the defendant but same neither being executed against nor satisfied the petitioners petitioned for a receiving and adjudication order against the surety.

Held: in the absence of a separate judgment against the surety, the Court could not be satisfied that an act of bankruptcy had been committed by the surety.

BANKRUPTCY PETITION.

S. D. K. Peddie for the creditors.

E. C. Khoo for the surety.

Suffian J.: The petitioners were plaintiffs in Kuala Lumpur Civil Suit No. 250 of 1956 in which one Mohamed Said was the defendant. On 5th November, 1956, before Abdul Hamid J. in Chambers judgment was entered against the defendant who was absent. On 10th December, 1956, Abdul Hamid J. set aside this order on the application of the defendant and allowed him to defend the action on his furnishing security in the sum of $5,000 in one surety. Mr. Liew Swee Lan alias Lee Kim Seng stood surety for him, signing a security bond in the presence of the Senior Assistant Registrar in these terms:

"**Security Bond**

WHEREAS the above suit has been instituted and on the 10th December, 1956, the above-named defendant, Mohamed Said alias Shamsudin Mohamed bin Shamsudin, was ordered to furnish surety in the sum of $5,000 (Dollars five thousand) with one surety to the satisfaction of the Senior Assistant Registrar of this Court.

NOW THEREFORE I, Liew Swee Lan alias Lee Kim Seng, proprietor of Kien Lee & Co., of No. 145, Sungei Besi Road, Kuala Lumpur, hereby undertake and submit myself to the jurisdiction of this Court and in the case of any failure by the said Mohamed Said alias Shamsudin Mohamed bin Shamsudin the defendant abovenamed to appear at any time when called upon while the suit above-mentioned is pending and until execution or satisfaction of any decree that may be passed against him in the said suit, I hereby bind myself to pay the sum of $5,000 which the said defendant be ordered to pay in the said suit and agree that the said decree may be executed against me in the same way as it might be executed against the said defendant."

The suit was heard on 6th May, 1959, and on 26th May, 1959, Smith J. gave judgment against the defendant.

It is alleged by the plaintiffs that the judgment has neither been executed against nor satisfied by the defendant and it is urged on their behalf that in view of the underlined words in the Security Bond this judgment can be enforced against Mr. Liew without any need to obtain a separate judgment against him. A Bankruptcy Notice dated 8th February, 1961, was served on him requiring him to pay the successful plaintiffs "the sum of $5,000 claimed by them as being the amount due on a Security Bond dated the 13th day of March, 1957, which you signed in their favour in the Kuala Lumpur High Court Civil Suit No. 250 of 1956 which they as plaintiffs had instituted against the defendant therein ..... and in which a final judgment amounting to $14,500, plus interest and costs, were obtained by them against the said defendant at the High Court at Kuala Lumpur dated 26th day of May, 1959, whereon execution has not been stayed, ..."

The plaintiffs then petition for a receiving and adjudication order against Mr. Liew.

Inche' Khoo for Mr. Liew opposes the petition on two grounds:—

(1) The judgment debt in the suit had already been satisfied by the defendant.

(2) The petitioning creditors have never obtained a final judgment or final order against him for the said sum of $5,000.

By consent it was agreed to dispose of this matter at this stage on the basis of ground (2) only.

Inche' Peddie for the petitioning creditors was unable to support his clients' petition by any statutory authority or reported decision.

Having considered this matter with some care, I feel bound to dismiss the petition.

By sub-section (2) of section 6 of the Bankruptcy Ordinance No. 20 of 1959 at the hearing of a petition such as this, the Court shall require proof of, among other things, Mr. Liew's act of bankruptcy, and if satisfied with the proof, may make a receiving order in pursuance of the petition, but if, in the words of sub-section (3), "the Court is not satisfied with the proof of ... the act of bankruptcy ... the Court may dismiss the petition." Acts of bankruptcy are dealt with in section 3, of which only paragraph (i) of sub-section (1) is relevant. That provision reads —